

Danger: The Ethics of Preemptive Action

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The law has developed principles for dealing with morally and legally responsible actors who act in ways that endanger others, the principles governing crime and punishment. And it has developed principles for dealing with the morally and legally nonresponsible but dangerous actors, the principles governing civil commitments. It has failed, however, to develop a cogent and justifiable set of principles for dealing with responsible actors who have not yet acted in ways that endanger others but who are likely to do so in the future, those whom we label "responsible but dangerous" actors (RBDs). Indeed, as we argue, the criminal law has sought to punish RBDs through its expansive use of inchoate criminality; however, current criminalization and punishment practices punish those who have yet to perform a culpable act. In this article, we attempt to establish defensible grounds for preventive restrictions of liberty (PRLs) of RBDs in lieu of contorting the criminal law. Specifically, we argue that just as a culpable aggressor becomes liable to defensive force, an RBD can become liable to PRLs more generally. Although there are many examples of PRLs of RBDs currently in operation, the principles, if any, that justify and limit such PRLs have yet to be satisfactorily established.

In the movie *Cape Fear*, Sam Bowden, a lawyer in New Essex, North Carolina, is menaced by a recently released convict, Max Cady, whom Bowden had, in Cady's view, inadequately defended against a charge of a violent sexual crime.¹ In the first movie version, Bowden was played by Gregory Peck and Cady by Robert Mitchum; in the remake, Bowden was played by Nick Nolte and Cady by Robert DeNiro—with Gregory Peck and Robert Mitchum now making cameo appearances respectively as a lawyer and police officer. Bowden knows Cady is up to no good. Cady makes vaguely threatening sexual moves toward Bowden's teenage daughter. He poisons the family dog. Nevertheless, Cady makes sure that he does not do anything for which he could get sent to jail. There is no proof that would stand up in court that he is the one who poisoned the dog, although everyone knows that he did.

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¹ CAPE FEAR (MCA/Universal 1961); CAPE FEAR (MCA/Universal 1991).

The problem is that there appears to be nothing Bowden or his family can do to escape the real danger Cady represents other than move to an undisclosed address. They can only be constantly vigilant and prepared to act in self-defense. Ultimately, Cady launches an attack against the Bowden family on its houseboat on the Cape Fear River—an attack that they successfully repel.

Dangerous people like Cady fall into an increasingly prominent category of people who are neither criminally culpable and thus punishable retributively, nor mentally ill to the point of moral and legal nonresponsibility and thus subject to civil commitment. Because such dangerous persons are morally and legally responsible agents, they do not meet the traditional criteria for civil commitment, namely being mentally ill and a danger to self or others. And because they have not yet committed a punishable act, they cannot be imprisoned through the criminal justice system. They are dangerous, yet apparently they must be left at large.²

Such a situation is unsatisfactory and unstable. Indeed, legal restrictions on the liberty of the responsible but dangerous—hereafter, the RBDs—have been increasing. We shall call these legal measures preemptive restrictions of liberty, or PRLs. They fall into several categories. Some are expansions of the category of acts that are treated as inchoate crimes, such as attempts, conspiracies, and encouragements. Some are expansions of the category of civilly committable persons, so that some people categorized as mentally ill are both civilly committable, but also RBDs with sufficient moral responsibility to be criminally punishable. Some PRLs restrict possession of dangerous items, such as some classes of firearms, explosives, or other materials, at all times or in particular circumstances (such as boarding an airplane), for the purpose of keeping such items out of the hands of RBDs. Some PRLs allow detention of terrorists so long as they harbor terrorist intentions. Some PRLs restrict freedom of movement of RBDs, such as laws restricting the residency of sex offenders and anti-stalking and other restraining or no-contact orders. We have even argued that self-defense and defense of others fall into the category of PRLs directed at RBDs, a point to which we will return.³ The list of PRLs aimed at RBDs is a long and growing one.

Despite this proliferation of PRLs, the principles that should regulate their use have yet to be worked out. This is not to say that there is agreement on the principles of retributive justice or civil commitment of the mentally ill. Far from it. Nevertheless, there is a general consensus on the contours of what makes someone criminally punishable or civilly committable. There is no consensus on how we should handle RBDs through PRLs.

² In the context of self-defense, Anthony Sebok has dubbed this the “Cape Fear gap,” the time between when the victim knows she is in danger and the time when she may permissibly act in accordance with the law’s requirement of an imminent attack. Anthony J. Sebok, *Does an Objective Theory of Self-Defense Demand Too Much?*, 57 U. PITT. L. REV. 725, 744 (1996).

³ See Kimberly Kessler Ferzan, *Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible*, 96 MINN. L. REV. 141 (2012).

We use the term RBD though we could have used RAD (responsible *and* dangerous) or DBR (dangerous but responsible). What is critical is that in our discussion we are focusing on responsible agents who are typically within the purview of the criminal law, *but* because of their dangerousness is also society's concern *now, prior to any criminal act*. We will not be addressing what qualifies as "D" for this discussion, though that question is quite difficult. An assessment of dangerousness requires a decision-maker to be able to determine the probability that the actor will harm others unless she is detained or committed. There is a range of concerns about these sorts of predictions, including what factors can count—age, race, and gender are statistically significant—and how determinations are made (statistical versus clinical predictions). We shall not enter that fray here. Rather, we shall assume that there is a way to predict dangerousness in a principled way. The question, then, is whether and how we are permitted to protect ourselves against the array of dangerous actors.

This article proceeds as follows. In Part I we discuss the various methods for dealing with dangerous persons, distinguishing PRLs from punishment, civil commitment, and protection. Part II then argues that inchoate crimes and their punishment are PRLs in disguise. This part further argues that inchoate crimes should not be criminalized or punished unless the defendant has unleashed a risk of harm that he can no longer control through will and reason alone. Part III then looks to self-defense against culpable aggressors and argues that some PRLs are justified by actions the aggressor has already engaged in, and then explores the extension of the self-defense reasoning to other PRLs. Finally, Part IV explores whether PRLs can be extended to other sorts of actors, including innocent aggressors and anticipated innocent or culpable aggressors, ultimately arguing that in most instances, it cannot. Part V briefly explores the impact of technology on PRLs.

I. METHODS OF DEALING WITH DANGEROUS PERSONS

A. *Criminal Punishment*

How can we reduce the threat from dangerous people? Obviously, if they commit crimes, we can choose a form of punishment that is commensurate with their criminal desert and that, in addition, averts, at least for a while, any danger to others that they present. So if a crime merits either flogging or six months in jail, the latter will provide six months of safety from future crimes while the former will not (at least for offenses outside of prison). Imprisonment, which is merely one of an indefinite number of forms of punishment, is a form well suited to protecting the public from the criminal. And obviously, capital punishment averts future danger from those who receive it.

Criminal punishment, however, does nothing to avert the danger of those who have not yet committed a crime, or whose past crimes have not yet been detected or successfully prosecuted. Nor does it avert the danger presented by those who

have served their deserved time in prison and are due to be released. So deserved criminal punishment, while it does avert some danger from the dangerous, fails to avert a significant portion of that danger.

B. *Civil Commitment*

The second technique we possess for averting the dangers posed by the dangerous is that of civil commitment. Traditionally, civil commitment of the dangerous has been reserved for those whose mental problems rendered them morally and legally nonresponsible and thus not appropriate subjects for criminal punishment. The classes of the civilly committable and the criminally punishable were not supposed to overlap. No one could be a member of both classes. RBDs, being morally and legally responsible agents, were not in theory civilly committable.⁴

The temptation to get at RBDs through civil commitment or something akin to it has proven to be virtually irresistible; however. One possibility is to change the location of the line distinguishing the responsible from the nonresponsible and increase the size of the latter class. After all, moral and legal responsibility is probably a scalar notion, with its threshold being somewhat arbitrary. Raising the responsibility threshold, however, would diminish the number of people who could be punished for crimes and has not been pursued. Instead, the requirement that, in order to be civilly committable, one have a mental condition that renders one morally and legally nonresponsible has been dropped in the case of sex offenders. Now, the sex offender's condition, if deemed a psychological pathology, can serve as the basis for commitment for dangerousness even if it does not provide an excuse for the commission of a sex crime.⁵

Once the requirement for civil commitment of a lack of moral and legal responsibility is dropped, there are unlimited possibilities for handling RBDs this way. One need only give the propensity for dangerous conduct some medicalized label—for example, "pathological jihadism"—and civil commitment would be available.

This possibility is at once both reassuring—we *can* avert the dangers posed by RBDs—and nightmarish. It is nightmarish because any of us and perhaps all of us are potentially RBDs. No limiting principles other than some crude utilitarian balancing are apparent once we proceed down this route to reduce danger.

⁴ Indeed, the Supreme Court believes that its jurisprudence holds true to that goal. In *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997), the Court sought to distinguish sexual predators who lack sufficient volitional control "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings."

⁵ See *Kansas v. Crane*, 534 U.S. 407, 413 (2002); see also Ferzan, *supra* note 3, at 153–54 (discussing this aspect of *Crane*); Stephen J. Morse, *Preventive Confinement of Dangerous Offenders*, 32 J.L. MED. & ETHICS 56 (2004).

C. *The Practice of Protection*

We shall return to commitment of RBDs in due course. There is another technique for dealing with dangerous persons that must be discussed. This is what one of us has called the practice of protection.⁶ This practice includes a multitude of acts the common denominator of which is that they are designed to make criminal conduct undesirable (for the criminal) or impossible. Such acts include threats of harm for the purpose of deterrence; fences—high, barbed, or electrified—around one's property, safes, moats, aggressive guard dogs, Lo Jack and GPS devices on property, surveillance cameras, and other techniques for "hardening" potential targets of crime. Protection also includes acts that sacrifice privacy in order to make criminal acts more difficult to commit with impunity, such as general surveillance, DNA collection, fingerprint collection, and other methods of collecting and retrieving personal data.

Protection differs from PRLs in this way: when one engages in acts of protection, one does not interfere with the rightful liberty of those against whom protection is aimed. The would-be burglar has no right that our property *not* be surrounded by a high fence, or that we not put our valuables in a safe. He has no right that we make his planned violation of *our* rights easy or safe. And with respect to intrusions on privacy, the only sensible approach to privacy is to see it as subject to various public safety limitations, so that, for example, surveillance cameras in public places and DNA data bases are not violations of would-be criminals' rights if they represent an appropriate balance of privacy and security.

But if acts of protection are not violations of anyone's rights, PRLs are, *prima facie*, a different matter. A pedophile merely contemplating molesting little girls has not yet committed any crime. And if he is a morally and legally responsible agent, he can recognize moral and legal reasons to refrain from his contemplated action and can conform his conduct in accordance with those reasons. So when his liberty is abridged by commitment to an institution, or by restrictions on where he can live or walk, it is not for reasons that would generally justify restricting liberty—that is, committing a crime or not being a responsible agent.

II. ARE INCHOATE CRIMES PRLs?⁷

We have argued that PRLs have expanded beyond restrictions on those who, because of mental illness, are not morally or legally responsible agents. We catalogued several types of such PRLs, including detentions of terrorists and sex

⁶ Larry Alexander, *The Doomsday Machine: Proportionality, Punishment and Prevention*, 63 THE MONIST 65 (1980).

⁷ The material in section II draws heavily on Larry Alexander & Kimberly Kessler Ferzan, *Risk and Inchoate Crimes: Retribution or Prevention?* in SEEKING SECURITY: PRE-EMPTING THE COMMISSION OF CRIMINAL HARMS (G.R. Sullivan & Ian Dennis eds.).

offenders, restrictions on residency and movement, and restrictions on possession of items that are dangerous when misused.

Another category of PRLs that we listed is that of inchoate crimes. Inchoate crimes, as we define them, refer to all crimes that criminalize conduct that anticipates but is temporally prior to the criminals' unleashing risks of harm that are now beyond their ability to control (as they see the situation). In other words, an inchoate crime is a crime that occurs while the actor still has the ability to choose to refrain from imposing the risk. On that definition, completed attempts and reckless endangerments are *not* inchoate crimes. A completed attempt is an attempt to commit a crime by an actor who believes that he has done everything necessary to commit the crime and that preventing the crime is now beyond his complete control. (That is, if he later decides to prevent the harm, he cannot do so through the exercise of reason and will alone; for instance, someone who lights a fuse typically recognizes that he is unleashing a risk that he cannot prevent simply by changing his mind and that for various reasons he may not be able to prevent even if he does change his mind.) The paradigm of a completed attempt is the actor's pulling the trigger on a gun that he believes is loaded, in working order, and pointed at a vital spot on the victim. If it turns out the gun is unloaded, or jammed, or misaimed, and the victim is not harmed by the actor's pulling the trigger, the actor has committed a completed attempt of murder. Similarly, the driver who drives recklessly but manages to cause no injury to life, limb, or property has committed the completed crime of reckless endangerment; for whether injury occurred was beyond his control once he committed the reckless act.

The paradigmatic inchoate crime is the incomplete attempt. In an incomplete attempt, the actor intends to commit a culpable act in the future and has taken some steps toward that end. (How many steps he must take and how close to committing the intended culpable act he must come are matters of controversy and vary from jurisdiction to jurisdiction.) Thus, for example, when Frankie lies in wait for Johnny to return home, at which time she intends to kill him with her .44, she has in most jurisdictions committed an incomplete attempt of murder.

Solicitation, conspiracy, and giving aid to another to assist the latter's commission of a future crime are often regarded as inchoate crimes. On our analysis, with the exception of a conspiracy in which the conspirator in question intends to carry out the future crime as the principal, these crimes, if they are truly culpable, are properly regarded as completed crimes of reckless endangerment.⁸ For the actors have unleashed beyond their control risks of *others'* criminal acts by virtue of encouraging or aiding those future acts. Only if the actor retains control over whether those future crimes occur do we have a true inchoate crime.

In *Crime and Culpability*, we argued that true inchoate crimes are not culpable and should not be punished.⁹ We think it fair to say that our position on

⁸ See LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 223–35 (2009).

⁹ *Id.* at 198–99.

inchoate crimes was the most controversial of all the controversial positions we took. Why did we conclude that true inchoate crimes are not culpable and thus not punishable acts?

Let us return to Frankie, lying in wait for Johnny, intending to kill him with her .44. Until Frankie pulls the trigger of her .44, while aiming it at Johnny's heart, believing it to be loaded and in good working condition, and not believing she is Superwoman and faster than a speeding bullet, has Frankie committed a culpable act?

Surely there are some culpable acts Frankie may have committed. Carrying around a loaded .44 for no reason other than to kill Johnny may create an unjustified risk of death or injury through an accidental discharge. Likewise, merely driving to Johnny's house, no matter how carefully, for the sole purpose of killing Johnny, may create an unjustified risk of a traffic accident. For even if these risks are very small in Frankie's estimation, if her only reason for imposing them is a bad reason—to kill Johnny—then her driving and carrying the .44 are reckless and culpable. And if she reaches the stage when she is pointing the gun at Johnny with her hand on the trigger, the risk of accidental discharge may be so high (in her estimation of the risk) that she is quite culpable for imposing the risk.

Furthermore, in addition to creating risks of accidental discharge or traffic accidents, Frankie may have culpably unleashed a risk of causing fear. For if she realizes that there is a risk that someone—perhaps Johnny, or perhaps a third party—will see her lying in wait with a gun and fear for his or another's life, then Frankie will be aware that she has unleashed this risk, and she will have done so for a reason—murder—that does not justify the risk.

So there are several culpable acts that Frankie may have committed or be committing in lying in wait for Johnny. But none of them is as culpable as a completed attempt at murder. Nor are any of the relevant risks the risk of Frankie's intentionally pulling the trigger while aiming at Johnny. In other words, these other possible culpable acts are not acts of attempted murder. And Frankie's intent to kill Johnny enters into the analysis of these acts' culpability only to establish that any risks Frankie perceives she is imposing are not justifiable risks.

Those who wish to make incomplete attempts criminal apart from the collateral risks they may impose and of which the attempter may be aware, do so because they think Frankie's *intending* to kill Johnny (and perhaps taking some steps towards realizing that intention) is what makes Frankie culpable as an attempted murderer. We rejected this, for reasons to which we now turn.

A. The Centrality of Intending a Culpable Act to the Case for the Culpability of Inchoate Crimes

A retributivist case for punishing inchoate crimes, such as incomplete attempts, ultimately must rest on the premise that intending a future culpable act is itself a culpable act. (Remember: we are excluding from consideration the various risks of harm that an actor, such as Frankie, may have already unleashed—put

beyond her ability to affect—in the course of conduct leading to the intended crime.) Why do we say that the key premise in the case for inchoate criminality is that intending a culpable act is itself a culpable act? After all, the law of incomplete attempts requires not only an intent to commit a wrong but also that the actor have taken steps towards acting on that intent that go beyond “mere preparation.” (Just how the line between “mere preparation” and attempting is drawn is inherently imprecise, and its formulation varies from jurisdiction to jurisdiction; here we shall use the Model Penal Code’s “substantial steps” formulation, which is a representative one.)¹⁰

The law might have two different concerns in requiring the (incomplete) attempter to have taken “substantial steps” towards acting on a culpable intention. One concern is to corroborate that the actor really does possess the culpable intention. The Model Penal Code states that the requisite-substantial steps must corroborate the actor’s culpable intent. This, however, seems unnecessary, as the culpable intent must always be proved “beyond a reasonable doubt.” Moreover, if an act requirement is added for the purpose of constraining the state and curbing abuse, such a rationale is not retributive; the act requirement is not based on what the actor deserves. It is an epistemic aid, not a substantive component of desert.

The other concern is a concern with dangerousness. The closer the actor is to executing her culpable intention, the more likely she is to execute it unless she changes her mind or someone or something intervenes to prevent her. The problem with this rationale for requiring “substantial steps” is that dangerousness and culpability are independent of one another, and each can be present in the absence of the other. We punish people because they are culpable, whereas we restrain people, when we do so, because they are dangerous. Frankie’s lying in wait for Johnny makes her more dangerous if she retains her culpable intent than she was when she first formed the intent to kill him—perhaps while sitting in a chair in her home, many miles from Johnny’s house. But does it make her more culpable? She is no less capable of changing her mind and relenting; and although she has sunk more costs in her plan to kill Johnny by the time she reaches her house, she still has an overriding reason to change her mind: namely, that her intended act is a culpable one. In other words, she still controls the culpability of her future conduct and still has an overriding reason to see that it is not culpable.

Here is another example drawn from *Crime and Culpability*,¹¹ that shows that the culpable intent is what does all the real work in deeming incomplete attempts culpable. David intends to kill Victor, who takes a daily walk on a trail that passes under Balanced Rock. David purchases a jackhammer and takes it to a point

¹⁰ MODEL PENAL CODE § 5.01(1)(c) (1985) provides:

A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he . . . purposefully does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

¹¹ ALEXANDER & FERZAN, *supra* note 8, at 210.

alongside Balanced Rock. He plans to start the jackhammer as Victor walks by so that its vibrations will unbalance Balanced Rock and cause it to fall on Victor. But as David sees Victor walking toward Balanced Rock, David decides to wait to execute his plan on another day because there are too many picnickers around. David departs, leaving his jackhammer behind.

Because David arguably took substantial steps towards killing Victor, and because he did not abandon his attempted murder out of a change of heart, David would arguably be guilty of an incomplete attempted murder in most jurisdictions and under the Model Penal Code. Now compare David with Darla. Darla happens to be picnicking right next to the spot where David leaves his jackhammer. Darla also hates Victor, and when she sees him coming, she realizes that she could kill him by starting the jackhammer, and she forms the intent to do so.

Surely if David is culpable for his incomplete attempt to kill Victor, Darla, when she forms the intent to kill Victor while sitting next to the jackhammer and Balanced Rock, is equally culpable. After all, *she is intending to kill Victor in exactly the same circumstances that David was in when he became guilty of the incomplete attempt*. So if David is culpable, so is Darla. And if Darla is culpable, it can only be because of her intent to kill Victor. So we would conclude that in David's case as well, it is David's intent to kill Victor that solely accounts for this culpability.

The argument must be, then, that Frankie's intending to kill Johnny is itself culpable. Substantial steps only prove (perhaps redundantly) that the culpable intention exists. They show that it is an intention, not a mere desire or fantasy, with which we are dealing. And they show that the intention is firm enough to have led the actor to have taken various steps towards executing it. So substantial steps may play an important epistemic role. Nevertheless, it is the intention, not those steps, that has to be the culpable element if Frankie's incomplete attempt is culpable.

Still, we should note that some authors disagree with us over whether substantial steps are merely evidential. Some have argued that the more steps the actor takes towards executing his intention to commit a culpable act, the more he is "rationally committed" to executing it and under "rational pressure" to do so.¹² But this is an argument that is very close to asserting that it is rational to recover "sunk costs."¹³ In the case of an intention to perform a culpable act, it is always

¹² See, e.g., Gideon Yaffe, *Trying, Acting and Attempted Crimes*, 28 LAW & PHIL. 109 (2008). Yaffe does not require the step beyond intending to be a particularly important one for executing the intent. It only has to corroborate the actor's intent. But because determining that it is such a step requires that we know the intent with which it was taken—was the purchase of the gun made for the intended killing or for marksmanship practice?—we must have independent evidence of intent. The step therefore adds nothing to an intent requirement. If one is "rationally committed" to an illicit end by taking a step in that direction, one is "rationally committed" to it by merely intending it.

¹³ Daniel Ohana argues that the more costs the actor has sunk into her criminal plan, the more likely she is in fact to carry it out. Daniel Ohana, *Desert and Punishment for Acts Preparatory to the Commission of a Crime*, 20 CAN. J.L. & JURISP. 113, 122–23 (2007). He concludes that the actor is culpable and hence deserving of punishment for having formed the plan and made some preparations

rational to change one's mind and desist—no matter how many steps taken and how much cost sunk. After all, the culpability of the intended act is in no way diminished by the actor's previous efforts towards committing it. ("I really shouldn't be blamed for the murder; after all, I spent an enormous amount of time planning it and enormous amounts of money on the weapon, the camouflage, the ticket to Rio") And the actor will not only be acting most rationally if she changes her mind, but she is also always free to do so.

B. *Is Intending a Culpable Act Itself a Culpable Act?*

If the element of an incomplete attempt that does the inculpatory work is the intent to commit the crime, we must confront the central question: *is intending to commit a culpable act itself a culpable act?* If the answer is "yes" then there is a retributive case for punishing inchoate crimes. If, as we argued in *Crime and Culpability*, the answer is "no," then only acts that unleash unjustifiable risks are culpable, whereas intendings, and the inchoate crimes that they constitute, are not.

Now the case for the culpability of intending a culpable act might seem obvious. After all, if Φ ing is wrong, then would it not follow that intending to Φ is wrong?

Surely there is something criticizable in intending a culpable act. That in itself does not show that intending the culpable act is culpable. For if Φ ing is wrong, does it follow that desiring to Φ is wrong, or fantasizing about Φ ing is wrong? Desiring or fantasizing about something bad is criticizable and may reveal character defects, but it is not a culpable act. Desiring, wishing, fantasizing, etc., are not culpable acts because they are not acts at all, and surely not voluntary acts. Because only voluntary acts can be culpable and merit retributive responses, these attitudes toward culpable acts are not themselves culpable. So even if Φ ing is a wrong justifying retribution, desiring to Φ is not.¹⁴

Nonetheless, we did not rest the case against inchoate criminality on the ground that intending a culpable act is not a voluntary act. Instead, we assumed the contrary, namely, that intending *is* a voluntary act. Or rather, and more precisely, we assumed not that an intention, a mental state, is itself an act, but that *forming* an intention is an act, and a voluntary one. Our case against inchoate criminality accepted that intendings were different from desirings, wishings, and fantasizings in a way that made intendings potentially eligible for retributive responses.

for carrying it out. *Id.* at 124. Again, we disagree. The actor has still not unleashed an unjustified risk, given that, until she completes the last act necessary to execute her wrongful plan, she remains in complete control and can abandon it at any point, regardless of the costs she has sunk.

¹⁴ Antony Duff argues that some of these cases, such as fantasizing, are cases in which an actor may have some control over her thoughts. Duff argues against criminalization of these cases because of autonomy and privacy concerns. See R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 102–05 (2007).

What we should have added is that although an intention may be merely a mental state, *maintaining* an intention, like forming one, can be viewed as a voluntary act. Much of our discussion of the culpability, if any, of intending a culpable act was premised on the unstated assumption that maintaining an intention over time was potentially culpable and thus could be viewed as voluntary action.

So both forming and maintaining intentions to commit culpable acts are eligible to be deemed culpable acts, unlike desirings, wishings, and fantasizings. Nonetheless, we concluded that neither forming nor maintaining intentions to commit culpable acts were culpable acts, even if forming and maintaining such intentions were acts. And we believe that conclusion is the correct one.

1. The Difficulty of Distinguishing Intentions from Desires

Intentions are not the same as desires, wishes, and fantasizings. That is clear. What is less clear is how the actors in a criminal justice system—the police, prosecutor, judge, and jury—will be able to distinguish an intention to commit a culpable act from these other mental states. Remember that we are dealing with inchoate crimes—in particular, incomplete attempts. The intended culpable act will not have been committed. At best we have a confession of the defendant and conduct consistent with that confession. But even the actor herself may have difficulty ascertaining whether she intended a future culpable act or merely desired it or fantasized about it. Will Frankie be certain she really intends to shoot Johnny, even if she has taken a loaded gun and driven to Johnny's home? And if Frankie cannot be certain she intends to shoot Johnny, can the rest of us be confident that is what she intends?

From this point on we shall assume that this epistemic worry has been overcome and that we can with sufficient confidence distinguish intentions from desires and fantasizings. Still, the murkiness of the line between intentions and these related mental states should itself give us pause about criminalizing intentions.

2. A Big Worry: The Conditionality of Intentions and the Opacity of the Future

Our intentions to engage in future conduct are almost always—perhaps always—conditional. We intend to engage in that conduct in certain circumstances but not in others. Some of those conditions may be present to our minds when we form the intentions. We say to ourselves, “I will go to the store at 3 P.M. unless it is raining or I am at a point in the article I’m working on where I’d best not stop.” Such conditions that will defeat or trigger the intended conduct are called “internal conditions” because they are part of the intentions as we mentally formulate them. On the other hand, most of the conditions that attach to our intentions are “external” in that they are not present to mind when we form those intentions. We

will not intend to go to the store at 3 P.M. if we discover that our car won't start and we would have to walk, or we hear that there has been a massive accident on the road to the store, and so on. We do not consciously advert to all these defeating conditions, but our intended conduct is nevertheless conditional on whether they obtain.

In an incomplete attempt, the intention to engage in the actus reus of a crime is, like all intentions, conditional. Some of the internal conditions that would cancel the intention show that the intention was not an intention to engage in culpable conduct. ("I intend to kill Sheila—but only if she is about to shoot Steve, or blow up the White House, etcetera.") Other internal conditions do not negate the culpability of the intended conduct but do make that conduct highly unlikely. If Roy intends to steal the *Mona Lisa*, but only if it is in the Met and not the Louvre, and only if it is not guarded, his conditional intention is culpable but very unlikely to be acted upon. The same is true if Samson intends to kill Delilah if she is ever unfaithful, but he believes (correctly) that she is and will remain faithful.

What is true of internal conditions is true of external conditions. Suppose one intends to drive from San Diego to Los Angeles in two hours' time, which requires an average speed of sixty miles per hour. When one forms this intention, he does not advert to the possibility that road and traffic conditions will make sixty miles per hour an extremely unsafe speed. Nonetheless, his dispositions are such that when he sees that he cannot safely drive at that speed, he will abandon his intention to arrive in two hours. Given what he now knows about the road and traffic conditions, his intention to drive to Los Angeles in two hours would be a culpable intention on which to act. However, although he did not consciously consider these adverse road and traffic conditions when he formed the intention to drive to Los Angeles in two hours, these external conditions on that intention were either always present or became present at some time prior to his driving.

The conditionality of intentions makes assessing their culpability much less straightforward than assessing the culpability of the intended acts themselves. As we have said, the culpability of the latter is a function of the risks of varying magnitudes to various legally protected interests that the actor believes his act has unleashed beyond his ability to affect, and the reasons for and against imposing those risks that the actor believes, with varying degrees of certainty, exist at the time of the act.

Consider again Roy the art thief. When he enters the Met, intending to steal the *Mona Lisa* if it is there and unguarded, he believes the probability that those conditions will obtain and he will steal the *Mona Lisa* to be vanishingly low. Has he, upon entering, committed burglary (which is really a per se incomplete attempt of the target felony)? Just how culpable is Roy's entering the Met with that conditional intention?

Or consider, analogously, Molly, the strong-arm robber. She says to Vic, "Your money or your life." She is not bluffing. She intends to shoot Vic if he does not hand over his money. But she believes it is almost certain that Vic will

hand it over and that she will not have to shoot him. Molly has committed robbery. Has she also committed assault with intent to kill or attempted murder?

Or return to Frankie, en route to Johnny's house with her .44. She intends to kill Johnny if she catches him *in flagrante* with another woman. However, she has never once caught him with any other woman. She believes that it is ninety-nine percent likely that Johnny is not with another woman now. Still, she does intend to shoot him if he is with another woman, which is why she is carrying her .44. How culpable does her conditional intention to kill Johnny make her if she believes it is highly unlikely that the intention will be triggered?

Finally, suppose Stacy intends to drive to her child's school to pick him up, and she intends to get there in ten minutes. If traffic is moving freely, the road is not icy, and so on, Stacy can get there in ten minutes without recklessly endangering others. And her intention to get there in ten minutes is not unconditional: she would not drive through a Boy Scout parade on the road, mow down pedestrians crossing at crosswalks, and so on. Still, there are some circumstances, quite unlikely but still possible, in which Stacy would drive recklessly to some degree, to which she may or may not be advertent when she forms the intention to get to the school in ten minutes. How should we assess Stacy's culpability for so intending?

Perhaps there is a solution to this problem of the conditionality of intentions. For example, perhaps we should assess the culpability of the actor's intention by asking what probability did he attach to his acting on the intention—or, what is the same thing, what probability did he attach to the conditions obtaining that governed whether he would act? (This, of course, will be difficult and perhaps impossible for those conditions to which the actor did not consciously advert but were nonetheless present dispositionally.) Then we could ask what culpability-enhancing and culpability-mitigating conditions did the actor believe would exist at the time of the intended act, and with what probabilities. The culpability of intending the act would be the average of the culpability of the various scenarios the actor envisioned might obtain at the time of the intended act, weighted by the probabilities he assigned each scenario, and discounted by the probability he attached to his actually engaging in the intended act (the probability that the defeating conditions would not exist).

If this "solution" appears impossibly complex—and it is—the problems of assessing the culpability of intending a (possibly) culpable future act are only beginning. For the actor may assess the relevant probabilities differently at different points in time.¹⁵ Take Roy the art thief, and assume he is charged not

¹⁵ It is certainly the case that a driver who is speeding may at different times during the speeding's duration assess its riskiness differently. The overall culpability of that driver will therefore be a function of his culpability levels during various segments of his trip. However, when we are dealing with only an intention to act in a risky way in the future, the fact that the level of perceived riskiness will vary from time to time in advance of the intended act adds an additional and troubling level of complexity to the culpability calculation. The speeding driver has already

with burglary but with an incomplete attempt of grand larceny. Roy may, at the time he forms the intention to steal the *Mona Lisa*, believe that it is quite unlikely that the Met possesses it. Later, he may assess that likelihood as higher (or lower). Similarly, over time he may alter his assessment of the likelihood of its being heavily guarded. Thus, Roy's estimate of the likelihood that he will ever execute his intention to steal the *Mona Lisa* will vary over time. Is Roy's culpability dependent on the point in time at which he is arrested? Could he have been more or less culpable if he had been arrested sooner (or later)? And is culpability assessed just at the moment of arrest, or is it the average of his culpability from the moment he formed the intention until the moment of arrest, which, too, will vary with the time of the arrest?¹⁶

What goes for the actor's estimate of the probability that he will execute the culpable intention also goes for his beliefs about the culpability-relevant facts that will obtain at the time of the intended act. Those beliefs may change during the time in which the intention is held.

For instance, assume that Jessica, the law school dean, decides to blow up the football stadium to protest the university's allocation of funds to the football team instead of a new law school building. At that point in time, she may not have yet considered whether she will blow up the stadium when it is full of people or when it is empty. She may be debating whether to wait until there is a home team present, or whether to ensure that it is a day when no one is in the area. But even if Jessica has resolved to blow up the stadium at a specific time, her beliefs about the

determined whether he will drive, what the road conditions are, and what speed he is driving. There are fewer calculations on the table.

Moreover, and more importantly, the way that the *duration* of the speeding affects the culpability of the driver is quite straightforward. We can take the various risks of various harms that the actor estimates his speeding is producing at each temporal interval and then multiply those estimated risks of harm by the number of temporal intervals in which the speeding occurs. The longer the driver dangerously speeds, the more culpable he is.

On the other hand, it is not at all clear how the duration during which an intention to harm is maintained affects the culpability of that intention. If Frankie intends to kill Johnny next week, is she more culpable than Harry, who intends to kill Sally tomorrow? And if so, why? See *infra* Part II. B. 3.

We thank Mitch Berman for raising the issue dealt with in this footnote.

¹⁶ Alec Walen argues that the conditionality problem can be solved. Alec Walen, *Criminalizing Statements of Terrorist Intent: How to Understand the Law Governing Terrorist Threats, and Why It Should Be Used Instead of Long-Term Preventive Detention* 101 J. CRIM. L. & CRIMINOLOGY 803 (2011). He is unwilling to inculcate those with seemingly unconditional intentions if they do not anticipate the inculpatory condition. However, he is willing punish those who form an intention to do something that is culpable as conditionally formulated, arguing "[i]f she shows a general indifference to the lives of others, or sees some extra value in killing innocents, then her culpability should be high, perhaps nearly as high as if she intended to kill innocents." *Id.* at 848. But this response fails to see the puzzle. The puzzle is that the intention is supposedly an inchoate offense that leads up to the eventual offense. And, we might presuppose that culpability should build over time. But this simply is not the case. Culpability will fluctuate over time as conditions change and the plan is reformulated. Moreover, because intentions are generally gappy and conditional, there are likely to be substantial changes over time.

attendant risks and possible justifying reasons may change several times between the time she forms the intent and the time she detonates the bomb: she may believe at one time that the stadium will be full of fans, at another that it will be empty, at another that it will be occupied only by a terrorist cell, and so on. If she were to detonate the bomb at any of these times, her culpability for doing so would vary enormously—from extremely culpable to possibly not culpable at all in the case of the terrorist cell. Again, is Jessica's culpability determined by her beliefs at the time she is arrested—in which case it may be high if she is arrested at t_1 but nonexistent if arrested at t_2 —or is it determined by the average culpability of her intention from the time of its formation to the time of her arrest? In either case, because her beliefs about risks and reasons will change over time, her culpability level will depend on the pure fortuity of when she is arrested. (And how does one "average" a culpable intention, as when Jessica believes the stadium will be full of fans, and a justifiable one, as when she believes the stadium will contain no one but a dangerous terrorist cell?)

Indeed, not only may Jessica's beliefs about risks and reasons change over time, but she simply may have formed no belief whatsoever about the degree of risk that she will ultimately impose, leaving this "detail" to be filled in later. The ultimate risks and reasons for the intended action, and therefore its culpability, will be indeterminate at the moment of forming the intention.¹⁷

To some, our concern may seem a bit inconsistent with our approach to moral luck. Here is the potential objection to our view. If Frankie shoots at Johnny, but a bird flies in the way, we argue that the bird is irrelevant to Frankie's blameworthiness. But then, why is it not equally irrelevant that at the time that Frankie forms the intention to kill Johnny, she is unaware of the fact that a flock of birds may later block her bullet or otherwise thwart her plans?

The difference is that when an actor forms an intention as to what he will do later, he understands that his plans are open-ended. Indeed, the law's difficulty in holding that conspirators intend to kill a police officer (before they pick their victim), or that an accomplice intends to aid a statutory rape (when the accomplice

¹⁷ One last point: Suppose Joe has a conditional intention, the condition of which negates the criminal harm. Suppose he intends to have sex with Virginia, unless she is under the legal age. It appears that at this time, Joe's intent is perfectly lawful. See MODEL PENAL CODE § 2.02(6) (1985). But if, "have sex with Virginia, unless she is under the legal age" is the major premise of Joe's practical syllogism, the minor premise might be "Virginia is (thankfully) over the legal age." If so, then the conclusion Joe reaches is "have sex with Virginia." For inchoate criminality, which intention should control—the intent in the major premise, which is legal, or the intent in the conclusion, which, if Joe is in error regarding Virginia's age, is illegal? Because Joe has not yet done what he intends to do, it is ambiguous whether he intends to have sex with Virginia (because he mistakenly believes she is over the legal age) or not to have sex with her (because he intends to have sex only if she is over the legal age).

(Of course, this problem only arises in connection with crimes that have strict liability elements or elements that require only the mens rea of negligence. And because we do not regard negligence as culpable—and strict liability is the antithesis of culpability—we would reject the very underpinnings of this problem.)

lends his buddy the keys to his apartment before the buddy even meets the underage girl), is motivated by the concern that, until we see a situation, we do not know how we will react. We do not even know what we will intend.

3. Another Big Problem: The Effect of the Duration and Renunciation of Intentions

Because intentions can be held for varying lengths of time, and because they can be revoked, we must ask how, if they are to be deemed culpable, their culpability is affected by these features. First, let us compare Hank and Harry.¹⁸ On January 1, Hank forms the intent to kill Sally next January 1. Later, on July 1, Harry forms the intent to kill Sally next January 1. On July 2, Hank has held the intention to kill Sally for over six months, whereas Harry has done so for only a day. Is Hank more culpable than Harry?

i. Assume Duration Does *Not* Affect Culpability

One view would be that the duration of maintaining the intention is immaterial to its culpability. On July 2, Hank and Harry are equally culpable. And Hank is as culpable on January 1 as he is on July 2 (barring changes in beliefs about conditions and circumstances that were discussed in the previous subsection).

But suppose that Hank now renounces his intention to kill Sally, whereas Harry does not. What effect does his renouncing it have on his culpability, and does it matter *why* he renounces it? (If he renounces the intended act because he views it as imprudent as opposed to immoral, should that deprive his renunciation of any effect on his culpability?)

If forming and maintaining an intention to commit a culpable act is itself a culpable act, then it is difficult to understand how the culpability that exists at that time can be expunged by later revoking the intention. The past is fixed and contains the culpable act. It cannot be altered. If Hank was culpable on January 1 for intending to kill Sally, he remains culpable for having so intended on January 1 even if he no longer intends to kill her, whether owing to prudence or conscience. Any view to the contrary would suggest our concern was not with past culpable acts but only with present character.

If the culpability of intending cannot be expunged by revoking the intent, and if the duration of maintaining the intention is immaterial, then Harry is just as culpable as Hank even if Harry revokes his intention after thirty seconds, whereas Hank has held his intention firmly for more than six months. Or if Harry is indecisive and forms the intent to kill Sally, then thirty seconds later revokes it (say, for purely prudential reasons), then forms it again, then again quickly revokes it, Harry has committed several culpable acts of intending to kill, whereas Hank

¹⁸ ALEXANDER & FERZAN, *supra* note 8, at 206–07.

has committed only one. But it seems odd to deem indecisive Harry more culpable and deserving of more punishment than steadfast Hank.

ii. Assume Duration *Does* Affect Culpability

Alternatively, we might say that Hank's holding the intention to kill Sally for six months makes him more culpable than Harry, who has held the intention for a much shorter time. The problem is explaining why the duration of the intention should matter. In our book we gave an explanation for why the duration of an act that the actor perceives to be risky matters: it matters because duration affects the degree of risk.¹⁹ (Driving for one minute while intoxicated is less risky than driving for an hour in that condition.) But the six-month duration of Hank's intention to kill Sally does not make the risk to Sally higher on July 2 than the risk from Harry's one day intention.

Perhaps one could argue that the longer an intention is maintained, the more resolute that shows the actor to be; and the more resolutely an actor holds a culpable intention, the more culpable he is. Both parts of this argument are problematic, however.

First, a person can maintain an intention for a long time and yet not be resolute; for when the time comes to act on that intention, he may change his mind. On the other hand, he may act on an intention formed only a moment ago. David may have maintained for weeks the intention to kill Victor by causing Balanced Rock to fall on him; but when the time comes to carry through, David thinks better of the idea and abandons the intention. Darla, who just forms the intention to kill upon seeing Victor and the abandoned jackhammer, may act on it.

Second, the link between resoluteness and culpability remains unexplained. Aside from showing that the intention to commit a culpable act really does exist, the resoluteness with which it is held, which is what duration is supposed to demonstrate, at most only affects (negatively) the likelihood of abandonment. It does not affect the culpability of the intention itself.²⁰ Perhaps the idea is that the culpability of an intention should be discounted by the strength with which it is held, so that an intention held half-heartedly can only be half as culpable as an intention held resolutely. In any event, we leave it to those who find intentions to commit culpable acts to be themselves culpable acts to work this out.

4. Why Should Incomplete Attempts Merge with Completed Attempts or Successful Crimes?

If forming and maintaining an intention to commit a culpable act is itself a culpable act, then when the actor actually commits the intended culpable act and

¹⁹ ALEXANDER & FERZAN, *supra* note 8, at 242–44.

²⁰ Thus, the duration with which an intention is held is unlike the quality of the deliberation leading up to forming the intention, which *can* affect culpability. *See id.* at 166–68.

unleashes the risk beyond his control to recall (or so he believes), why has he not committed *two* crimes? If the risk is realized, why has he not committed both a successful crime and the inchoate crime of intending it? If the risk is not realized, why has he not committed both that inchoate crime and a completed attempt? Indeed, for reasons already mentioned, the culpability of the completed crime or attempt may be less than that of the incomplete attempt because the circumstances that the actor believes exist at the time he unleashes the perceived risk may make his act less culpable than the circumstances he envisioned would exist at the time he formed the intent. When Jessica formed the intention to blow up the football stadium on Saturday, she may have thought the stadium would be full of spectators. When on Saturday she detonates the bomb, or tries to, she may realize that there is no home game that day and that the stadium is empty. The only damage the bomb will cause is to the stadium itself. Jessica's final act is culpable, but it is much less culpable than she believed it would be when she formed the intention. Had she been arrested earlier, and if incomplete attempts are culpable, then she would have been more culpable than she was when her intended act was executed. Why then should she not be guilty of *two* culpable acts?

No one, to our knowledge, has proposed making an incomplete attempt that then is followed by a completed attempt or successful crime a separate crime from the latter crimes. It is assumed that the incomplete attempt merges with the crime or the completed attempt. If, however, the incomplete attempt is *more* culpable than the completed attempt or the crime attempted—and remember, for us, results do not affect desert, so completed attempts are all that matter and deserve the same punishments as the crimes they attempt—then any merger would have to go in the opposite direction.

The differences in culpability between the earlier incomplete attempt and the later completed attempt is not the only problem facing merging incomplete attempts with the completed attempts that follow. Let us return to David and Darla and their separate intentions to kill Victor by unbalancing Balanced Rock. Suppose David concocts his plan, purchases a jackhammer, positions it next to Balanced Rock, and waits for Victor to begin picnicking below it. It is a hot, humid day, and just as Victor arrives and places his picnic basket below Balanced Rock, David faints from the heat. And that point, Darla sees the jackhammer, sees Victor, and forms the intentions to kill him in the same way David had planned to do so. She turns on the jackhammer, the vibrations from which cause Balanced Rock to become unbalanced, and it tumbles over the cliff in Victor's direction. Fortunately for Victor, it is deflected by an unnoticed boulder and misses him.

Now Darla is surely guilty of a completed attempt to kill Victor. For she unleashed the risk of his death beyond her control, was aware that she was doing so, and had no belief that would justify her act. And if we are to have incomplete attempts, then surely David committed one, having gotten to a point in his plan just short of activating the jackhammer. So there have been two attempts to kill Victor—David's incomplete one, and Darla's completed one.

If that is true, however, then let us take Darla out of the picture. After David faints from the heat—and remember, he is now already guilty of an incomplete attempt—he recovers consciousness. He is temporarily disoriented and has no recollection of why he and the jackhammer are next to Balanced Rock. But he sees Victor, forms the intention to kill him, activates the jackhammer, which unbalances Balanced Rock, which narrowly misses Victor. In other words, after David recovers consciousness, he acts the same way Darla acted in the previous example. Therefore, David should be guilty of two attempts—the first, incomplete attempt, and the second, completed attempt.

Now alter this example slightly by assuming that when he recovers consciousness, David remembers why he and the jackhammer are where they are. Is he not still guilty of the two attempts? We cannot see why it should matter whether his later intention to kill Victor does or does not link up in his consciousness with his earlier intention to kill him. So if there are two attempts when David does not recall his earlier intention, there should as well be two when he does recall it.

Further, if that is correct, then it should not matter that David faints after he commits the incomplete attempt but before he commits the completed one. Even if there is no break in the action, once David crosses the line making him guilty of the incomplete attempt, his further acts make him guilty of a second attempt—the completed one. Indeed, per Achilles and the Tortoise, *David is theoretically guilty of an infinite number of incomplete attempts as well as one completed attempt* once he has crossed the line for incomplete attempts.

So the merger of incomplete attempts with completed ones is problematic for two separate reasons. First, the actor's culpability will vary over time depending on the circumstances he believes will exist at the time he unleashes the risk. Second, there is no reason not to see each step beyond the incomplete attempt line as a separate attempt, as indicated by the David and Darla example. In any event, we are not going to try to resolve these problems. We leave that to the proponents of deeming incomplete attempts to be culpable.

5. The Revocability of Intentions

There is a final problem with deeming intentions to be culpable and punishable, and this concern is decisive for us. This is the problem that intentions are open to reconsideration and thus revocable. On the one hand, if it is not necessarily rational to reconsider one's intention, the decision to do wrong may be the point at which the balance of reasons has shifted for the actor, and he has committed the culpable—unreasonably dangerous—act. The formation of the intention might then be analogous to the lighting of a long fuse where, although the actor may still exert control over whether the harm does materialize, the risk to the victim has nonetheless increased. One might thus argue that from the actor's perspective, the risk to the victim has increased because, even from the actor's perspective, the actor's balance of reasons has shifted. Thus, if this risk is being

imposed for insufficient reasons, the actor has committed a culpable act in forming the intention itself.

However, when one is planning to commit a crime, it will *always* be rational to reconsider. Indeed, many intentions are formed with the proviso that there can always be later reconsideration. Although intentions may serve to guide our future decisions, they are not irreversible, nor may they be carried out without any further effort on our part. The risk from the actor's point of view—objectively risk is always zero or one—may have increased, because the actor believes he will act as he now intends; but the actor still remains in total control of whether this risk will be unleashed, and he knows this.

Now, it may be said that there is a distinct difference between rationality and culpability. After all, an individual who has lit a fuse will also be under rational pressure to stomp out the fuse, so the pressure to reconsider cannot itself suffice to make the act of forming the intention nonculpable. Even if the actor may be able to change his mind and “revoke” his intention, how does any irrationality in not reconsidering render the initial choice less culpable?

Unlike a lit fuse, however, which the actor may find himself unable to put out even if he now wishes to do so, the actor who only intends to unleash risk in the future knows that he is still in control of his actions. And, indeed, just as crucially, through the exercise of reason and will alone, he may “stop” the harm from occurring. The common law's focus on *locus poenitentiae* is best thought of not as an opportunity to abandon or renounce, but as an opportunity to continue deliberating and change one's mind. Just as the criminal law seeks to influence the reasons for which one acts, the criminal law should allow room for deliberation, even including room for the formation and renunciation of an intention. The actor may still deliberate and think the better of his plan.²¹

Moreover, often when actors intend an act that may in some circumstances be culpable, the actor will not have considered whether he will really go through with it in those circumstances. Or he may have considered it, believes that he will, but in fact he will not. He cannot know until he actually commits the act in the culpability-creating circumstances (or fails to commit it).

In our view, even if there is rational pressure to stick with one's intention—pressure that in some way increases the risk of harm—there is also rational pressure to abandon one's criminal plan, pressure that decreases the risk of harm. Hence, rationality cuts in both directions and cannot therefore point to an increase in risk. In short, an actor cannot regard his future acts as properly subject to a risk assessment, for he cannot regard himself, even given his intention, as a force beyond recall.²² One may know that forming the intention, or buying the gun, does

²¹ See DUFF, *supra* note 14, at 104.

²² Individuals do not view themselves in this way even when actuarial tables do. So, Ken does not believe he must be a bad driver just because he is seventeen. Nor does Kirk believe that he will commit a crime just because he is a young, inner-city black male, nor does Kelly believe that if she quits her job, she will commit a crime—even if being a young, inner-city black male or being

in some sense make one “more committed” to the crime, but one also knows that one can *and should* think the better of one’s plan, and this influence serves as an important counterweight. Intentions are guides to future actions that do not prevent our later reconsideration. It follows that an actor has committed a culpable act only at the point where the actor believes he has truly relinquished control, not at the point at which he forms the intention to unleash a risk in the future.

Mitch Berman has criticized our argument in this section.²³ His argument, reduced to its essentials, is that when actors take steps to execute culpable plans, they do increase the likelihood of those plans being executed, and they realize that they are doing so. When the Jackal, who plans to assassinate de Gaulle, purchases a ticket to Paris, he realizes that he has increased the chances of the plan’s success over what they were before he purchased the ticket. (If the Jackal cannot get to Paris, he cannot assassinate de Gaulle.)

We do not disagree with this point. It is surely true. Our point, however, is this: although the Jackal can believe that by purchasing the ticket he has increased the probability that he will assassinate de Gaulle *if he does not abandon his plan to do so*, he will not believe that his decision to continue with or abandon that plan is probabilistic in the same way. Although social scientists may look at human acts objectively and probabilistically, we ourselves cannot take such an objective and probabilistic view of our own future decisions:

Let us elaborate this point a bit further. Suppose we know that we should not eat ice cream—say, we are diabetic—but that our children enjoy ice cream. If we do not buy ice cream at the store, then it will not be in our freezer tonight. And if ice cream is not in the freezer, then there is no chance we will eat it. On the other hand, if we do buy it and put it in the freezer, there is a chance we will eat it even if we do not intend to do so when we buy it. For we might later change our mind and intend to eat it. In that sense, buying the ice cream does raise the probability that we will eat it.

Likewise, if we (1) purchase a sharp kitchen knife for culinary reasons and (2) intend to go on living, then we might form the intention to stab someone with the knife even if we have no such intention when we purchase it. Again, in that sense, both purchasing a sharp knife and, more generally, intending to continue living raise the probability that we will harm someone intentionally. Moreover, when we purchase the knife and intend to continue living, we *know* we are raising the probability of harming others in this way.

We do not, of course, regard purchasing ice cream for our children, in normal circumstances, as imprudent, even though it may raise the probability of imprudent acts. Likewise, we do not regard purchasing sharp kitchen knives for culinary reasons as culpable, despite this change in the probability of culpably harming

unemployed is a predictor of criminality. And Kendra, who currently intends to steal a car, knows that she, too, has it within her complete control to choose otherwise.

²³ Email from Mitch Berman to authors (Aug. 10, 2011) (on file with authors).

others. A fortiori, we do not regard prolonging our lives as culpable even though prolonging our lives also raises the probability of culpably harming others.

Notice, however, that just as we may go from now not intending to harm someone (or eat ice cream) to later intending to do so, so too can we switch from now intending to harm someone (or eat ice cream) to later *not* intending to do so. And if the balance of reasons favors not intending to harm (or eat ice cream), then we have most reason to change our intention in such cases. Our present intention to harm (or eat ice cream) is itself *not* a reason in favor of doing what we intend.²⁴ And what is the probability that we will change our intention to one in accord with the balance of reasons? We cannot take a probabilistic view of our own intentions, even if they are relatively predictable by outside observers. We will always regard ourselves as free to choose as reason dictates—or to choose *against* the balance of reasons if our initial intention is in accord with that balance—and to be able to confound any prediction of what we will ultimately intend at the time of acting.

Indeed, as one final example, consider Andrew, who has robbed three banks in the last year, decided at the last minute against robbing a fourth, and has now formed the intention to rob a fifth bank. When he is obtaining a gun, the fact that he has robbed banks seventy-five percent of the time after he forms the intention to do so does not bear on whether he will rob the fifth bank. This is true even if he can report the probabilities based on his prior actions. He has no reason to see himself as compelled by the probabilities to rob the fifth bank, nor does he have any reason to see himself as compelled by the probabilities not to rob it. He understands, as he buys the gun, as he lies in wait, as he approaches the teller, that *he* can decide based on the facts as they appear to him at the crucial moment whether he will rob the bank. When he looks the teller in the eye, he makes his decision in accordance with the reasons that he has, and probability is not one of those reasons. He does not say to himself, for example, “Well, I will now put four numbers in a hat, and if I draw a one, two, or three, then I have to go forward, but if I draw a four, then I won’t.” Rather, he understands both that at t_1 , his early actions do not compel later behavior, and that at t_2 , his later behavior is not dictated by his earlier actions. So, whether because he gets a call that his mother is in the hospital, sees a police officer and gets scared off, or simply decides that it is wrong to rob banks, the decision not to rob the bank is a decision that he knows he is free to make at all times until he actually engages in conduct that unleashes a risk of harm to others. That is the point at which he can no longer, by reconsidering the merits of his plan and changing his mind, effectively avert the harm.

²⁴ See, e.g., John Broome, *Are Intentions Reasons? And How Should We Cope with Incommensurable Values?*, in PRACTICAL RATIONALITY AND PREFERENCE 98, 98–99 (Christopher W. Morris & Arthur Ripstein eds., 2001).

C. *The Unavailing Attempt to Manufacture Culpability by Redefinition*

To this point we have argued that inchoate crimes—most notably, incomplete attempts—are not culpable because their key ingredient, forming and maintaining an intention to commit some harmful or risky future act, is not itself a culpable act. How would the analysis change if on the same facts, the actor is charged, not with an incomplete attempt to commit crime X, but with the successful commission of completed crime Y? Suppose, for example, Frankie, lying in wait and intending to kill Johnny, is charged, not with an (incomplete) attempted murder, but with the crime of “lying in wait with the intent to kill”? If there were such a crime, then Frankie would have committed it rather than merely attempted to commit it.

There are, in fact, a large number of crimes on the books that are the products of making certain paradigmatic forms of attempting certain crimes into separate crimes. Burglary is a good example. Entering a premise with the intention of committing a felony therein is a paradigmatic way of (incompletely) attempting the intended felony. Now that burglary is itself a crime, however, the burglar can be charged with having committed burglary rather than with having attempted the felony.

Can such a move justify treating dangerous people, like our Frankie, as culpable criminals and thus eligible for imprisonment? Douglas Husak has proposed just such an approach for dealing with RBDs.²⁵ To deal with terrorists, for example, we could have a variety of crimes defined as “doing X, Y, or Z with the intention of committing a (suitably defined) terrorist act.” In other words, we could handle RBDs through the criminal law rather than by civilly committing people who qualify as responsible agents.

The problem with this approach is that it assumes we can manufacture culpability. If Frankie should not be charged with an incomplete attempt to murder Johnny because she has not committed a culpable act, merely redefining what she has done—lying in wait with the intent to kill—will not make her culpable. *Culpability is not itself a function of how crimes are defined.*²⁶

²⁵ Douglas Husak, *Lifting the Cloak: Preventive Detention as Punishment*, 48 SAN DIEGO L. REV. 1173 (2011).

²⁶ Mitch Berman asks whether we deny that one can be blameworthy for knowingly violating a rule of a legitimate normative system even if the conduct would not be blameworthy but for the prohibition. Certainly, there are some legal rules, such as those that solve coordination problems, that have the effect of making an act blameworthy that was not before. That is, it is dangerous to drive on the left after the decision is made for everyone to drive on the right. On the other hand, we are deeply skeptical that over-inclusive criminal legislation can be morally justified. See ALEXANDER & FERZAN, *supra* note 8, at 297–302. Moreover, even if it can be, we maintain that violating such a rule (when the application of the rule is over inclusive vis-à-vis the actor) is only culpable and punishable to the extent that it threatens rule of law values and not because of any culpability with respect to the underlying interest. *Id.* at 310–13. Hence, if a driver goes through a red light in the middle of the night with a clear view that no one is coming, then he is not culpable with respect to death, serious bodily injury, or property damage. He is only culpable to the extent that he understands his conduct may undermine others’ respect for and willingness to abide by the law.

If we could manufacture Frankie's culpability this way, then we could manufacture culpability all over the place. If, as we have argued, an incomplete attempt is not culpable, then calling it "burglary" does not make it so. After all, if burglary is culpable, then an incomplete attempt of *it* could be made culpable—for example, "buying a crowbar with the intent to enter a premise with the intent to commit a felony therein." And then, an incomplete attempt to commit that new crime could be made into a new crime ("driving to a hardware store with the intent of buying a crowbar with the intent . . ."). And so on and so on. In effect, proposals like Husak's are proposals to make merely intending harms or dangerous acts a criminal act. However, the objections to regarding such intentions as culpable that we have set forth above, unless rebutted, block such a move and reveal offenses such as possession of burglar's tools to be unjustifiable. Expanding the criminal law to cover RBDs is objectionable.²⁷

III. A NEW APPROACH TO JUSTIFYING PRLS FOR RBDs

In the previous section, we went to great lengths to demonstrate that we could not regard RBDs, such as the fictional Max Cady or the hypothetical Frankie lying in wait for Johnny, as culpable prior to their having taken the last act they believed necessary to unleash, beyond their ability to recall, the risk of harm to their victims. We thus expressed our opposition to inchoate crimes that criminalize conduct short of the act the defendant believes puts the risk of harm to others beyond his control. Such inchoate crimes include attempts other than "last act" attempts and conspiracies that contemplate further acts by the defendant. (Solicitation and conspiracies that contemplate crimes by conspirators other than the defendant are a different matter: the defendant's encouragement of others' crimes unleashes risks of those crimes beyond defendant's ability to control.)

We now want to introduce a very significant qualification: even if criminal punishment is unavailable, we maintain that other PRLs are. Specifically, individuals are permitted to use self-defense against culpable aggressors, and the rationale behind this defense also extends to some acts of preventive detention.

The use of defensive force is preemptive; it occurs before the attacker fires the bullet or plunges the knife. The attacker has not taken the last act he believes necessary to place the risk of harm beyond his control. Thus, self and other defense fall into the category of PRLs; and when they are employed against attackers who are morally and legally responsible agents, they are PRLs employed against RBDs.

In addition, because self-defense is a preemptive practice, it cannot be justified by *whether the aggressor would have succeeded or whether he would*

²⁷ The underlying substantive disagreement between Husak and us lies with his acceptance of punishing incomplete attempts. Because he believes that we can justify punishing incomplete attempts, he likewise believes that we can justify punishing these other acts. However, if one doubts that the punishment of incomplete attempts can be justified, then Husak's proposal does not solve that problem; it just relocates it.

have changed his mind. Rather, whatever grounds the victim's right to respond must be evaluated at the moment the defensive response is initiated. Alice is permitted to defend herself against involuntary Russian roulette by Betty, even if (unbeknownst to Alice) the bullet is not in the fateful chamber, or even if (unbeknownst to Alice) Betty would have changed her mind.

A. Culpable Aggressors as RBDs

In our view, culpability is the key determinant of when someone is liable to defensive force.²⁸ In our prior discussions of self-defense and other-defense, we distinguished between culpable aggressors (CAs) and innocent aggressors (IAs).²⁹ We will return to IAs below, but we must first focus on the class of CAs. We will not give a full defense of a culpability-based view of self-defense here, but rather focus on one apparent puzzle for us: Given that we have argued that attackers who have not yet taken the last act they believe necessary to unleash the risk are not culpable as attempters, is the class of CAs a null set? Put differently, how can a CA be culpable?

In our book, we answered that although the CA is not culpable for an attempted crime, the CA *is* culpable for unjustifiably creating the risk that he would cause others to fear that a crime will be committed.³⁰ *That risk—of creating fear—has been unleashed beyond recall.* And so long as the CA's intention is currently an intention to cause or risk harm to another, then even if it is qualified by internal and external conditions that do not entirely negate the culpability of the intended act, his intending that act is unjustifiable and thus culpably can create fear in others. That is how CAs can be culpable, and the class of CAs can be other than a null set.

So given what they intend, the likelihood that they will do what they intend unless restrained, the likelihood that doing what they intend will cause harm, and the likelihood that doing what they intend will be culpable when done, Max Cady and Frankie are probably CAs. They are not culpable for, respectively, attempting to assault the Bowens or attempting to kill Johnny. *They are culpable for unjustifiably creating apprehension of an unjustifiable attack.* And given that they are CAs, they are liable to preemptive defensive action. That is, those in whom such CAs culpably cause fear may impose PRLs on them.

Although we continue to believe that consciously risking the creation of fear is a culpable act that justifies either a PRL or criminal punishment, we also believe that the type of culpability required to render one liable to a PRL is not the same type of culpability required to render one liable to criminal punishment. Criminal punishment is responsive to what the defendant has done; thus, to justify

²⁸ For further exploration, see Kimberly Kessler Ferzan, *Culpable Aggression: The Moral Basis for Liability to Defensive Force*, 9 OHIO ST. J. CRIM. L. 669 (2012).

²⁹ ALEXANDER & FERZAN, *supra* note 8, at 108, 136–38.

³⁰ *Id.* at 113.

punishment, the defendant must (in his mind) have unleashed a risk of harm beyond his control. PRLs, on the other hand, are not justified by what the actor has done, but *what he might do*. And, RBDs intend impermissible acts. Hence, once one has formed an intention (even if conditional) to commit a culpable act, he has given the defender a reason to stop him, unless and until he changes his mind. More precisely, once the CA forms the intention to commit an act that he believes could be committed in circumstances that would make it culpable, and he does not condition his intention (either internally or externally) in a way that negates that possibility, then the CA *is* culpable for forming and maintaining that intention—not in terms of desert and punishment, but in terms of liability to PRLs by anyone who detects that intention. In almost all cases, however, the defender will not be aware of the CA's culpable intention until the CA performs an action, and that action will cause apprehension.

B. *The Parameters of Self-Defense*

As discussed, one permissible PRL is the potential victim's use of force in self-defense against the CA. We will not engage in an extensive discussion of self-defense here, but some particular features of it bear noting.

First, there must be a connection between the CA's action and the defender's response. In other words, we have both (separately) endorsed the view that self-defense requires belief in the justifying facts. If the defender lacks the justifying belief, he is culpable for attacking the CA, even if a third party who has the justifying beliefs would be justified in coming to his defense.³¹ In almost all cases, what links the CA's culpability to the defender's fear of attack is the very fact that the CA has aggressed. That is, the CA has performed some action that creates apprehension of an impending culpable risk-imposition. If, however, the defender finds out about the CA's plan without the CA's having acted—by, for example, finding the CA's diary in a vault—and the defender responds with a PRL to this perception of a planned attack, this PRL can also be justified.

Second, there is a question about proportionality. The ultimate PRL that may be imposed on a CA is deadly force. There is a tenable argument that *any* CA is liable to defensive deadly force. In other words, there is an argument that proportionality should not be a requirement when deadly force is employed in self-defense or defense of others against a CA. After all, proportionality requires the defender to sacrifice lesser rights in order to avoid causing serious harm to the CA, and one can legitimately question giving the interests of the CA the power to trump those rights.³² However, if there is an alternative and more proportional defensive

³¹ For our views on the relation of justification and culpability in the context of the lesser evils defense, see Larry Alexander, *Unknowingly Justified Actors and the Attempt/Success Distinction*, 39 TULSA L. REV. 851 (2004); Kimberly Kessler Ferzan, *Justifying Self-Defense*, 24 LAW & PHIL. 711 (2005).

³² The same goes for the requirements that the deadly force be *necessary* and that *retreat* not be a viable option; for necessity and retreat are really just aspects of the requirement of

measure that does not entail any increased risk of irreparable (or perhaps severe) harm, then the victim may be required to choose that measure over a more severe one.

C. PRLs Beyond Self-Defense

What we have shown, we believe, is that we can justify imposing PRLs on RBDs if the RBDs are CAs. If, for example, we catch Frankie lying in wait for Johnny, intending to kill him—or a terrorist planning a terror attack—we have argued that we cannot punish them for attempts. Yet, it would be insane to just let them go, given that they still intend to kill. Arguably, we may lock them up for as long as they have the culpable intention, not to *punish* them, but to *defend* ourselves or others against them. They *are* punishable for culpably causing fear, but their deserved punishment for *that* is not the reason we can justifiably lock them up, perhaps for life, as long as they retain the intent to kill (or in the pedophile's case, the intent to sexually molest children; in the abusive ex-boyfriend's case, the intent to batter the ex-girlfriend, and so on).

As one of us has argued, CAs are liable to other PRLs.³³ Although a fully developed preventive regime does not currently exist, it would be normatively defensible for the reasons we have outlined here. This regime could include everything from preventive detention to lesser intrusions, such as electronic monitoring. Such a regime would allow us to decriminalize many inchoate crimes and recast them as the PRLs they actually are.³⁴

D. PRLs or Punishment?

One might respond to what we have just said by pointing out that if CAs are culpable for unjustifiably causing fear (or risking causing fear), it would be just to punish them. And if that is the case, then what looks like a PRL is really retributive punishment. For if at every moment the CA has the intention that renders him culpable and he deserves to be confined, there will be no difference between deserved punishment and the PRL, which itself can only be justified for the duration of the dangerous intention.

We doubt that the severity of deserved punishment would be identical to the severity of the PRL that can be justified. The deserved punishment in this case would be the amount of punishment the CA deserves for risking creating fear. On the other hand, what the CA intends may be extraordinarily significant. Therefore, what is proportionate punishment for causing fear is likely to look nothing like

proportionality, given that they demand that the defender give up lesser rights than life or bodily integrity rather than employ deadly force.

³³ See Ferzan, *supra* note 3.

³⁴ See generally Kimberly Kessler Ferzan, *Inchoate Crimes at the Prevention/Punishment Divide*, 48 SAN DIEGO L. REV. 273 (2011).

what is a proportionate reaction for stopping a terrorist attack. In addition, deadly force in self-defense or defense of others, if it does not require the degree of confidence in the culpability of the putative aggressor as would "proof beyond a reasonable doubt," is a PRL much more severe than would be the deserved punishment for culpably causing fear. So if we are sufficiently certain that someone like Max Cady or Frankie still holds an intention to impose a risk of harm that is not conditional in a way that negates the culpability of the intended act—and we leave unexplored just how certain we must be of that intention—then we will be entitled to impose PRLs without regard to whether they exceed in harshness their deserved punishment.

In addition, even if one disagrees with our view and believes inchoate crimes are properly criminalized, PRLs are still preferable for this same reason.³⁵ Theorists who support punishing inchoate crimes also believe that these crimes warrant less punishment than the crimes that are their targets or completed attempts of those crimes—primarily, we suspect, because of the concerns about the very difficulties we have mentioned. What this means, then, is that Frankie may be punished for say, two years for intending to kill Johnny and lying in wait outside of his home. If she changes her mind after one month, she still stays in jail. However, if she still harbors the intention after two years (which we will call t_2), then she will need to be prosecuted again, and then put in jail at t_3 for the intention at t_2 . *In contrast, a PRL should be directly responsive to the intention that exists at the moment of its imposition.* This is both practically attractive and theoretically elegant. If we really want to prevent the harm from happening, then let us use a PRL. If we want to punish what has been done, then let us use punishment.³⁶

Finally, the imposition of these PRLs would not be subject to the same difficulties we have raised about punishment for inchoate offenses.³⁷ Let us first consider renunciation and duration. We have reason to prevent an individual from acting for as long as, but not one minute longer than, that person holds a criminal intention. Now, it is certainly the case that an individual whose intention fluctuates may ultimately be held for longer or shorter than is necessary simply because we lack the epistemic and practical resources to determine the exact moment when an intention is renounced or reaffirmed. So someone might be subjected to six months detention even though she abandoned the culpable

³⁵ See *id.*

³⁶ Because many acts of punishment simultaneously incapacitate the offender, the conditions of punishment and the conditions of prevention may not always appear strikingly different. However, theoretically, these are two very distinct practices, and there is nothing that requires them to converge in practice. We could have a system of punishment that achieves stigma and hard treatment without it incapacitating (public floggings did not incapacitate), and the issuance of a restraining order or the retraction of a passport as PRLs need not involve (and certainly need not be aimed at) stigma or hard treatment.

³⁷ Portions of this discussion are drawn from Ferzan, *supra* note 34.

intention after four months. Still, as a normative matter, fluctuations do directly impact liability.

Now, consider conditionality. If Jennifer intends something that is not currently a crime (drive fifty miles per hour home)—though the intention will hold in the face of inculpatory events (a horrible rainstorm as she drives by a school)—, then she has not currently chosen to risk harming others. Jennifer may therefore be dangerous (or what we call below an “Anticipated Culpable Aggressor”), but she is not culpable now. Sarah, who has a seemingly culpable intention (to harm Joe) that is actually externally conditional (unless Joe cries), and that she will abandon, should not be punished as if she will follow through. But for the moment, Sarah does so intend to harm Joe, and Joe (and the rest of us) are therefore rightly concerned with stopping her. Therefore, we have a reason to detain her until we can get her to change her mind. (Indeed, if we succeed in getting her to change her mind, then Sarah’s intention was also externally conditional on whatever it was that we did.)

Prevention and punishment also differ regarding who should bear the risk of error as to whether the actor will commit the offense. Consider Albert, a CA, who points a gun at Bridget and says, “I am going to kill you.” Bridget cannot justify killing Albert *because Albert deserves it*. After all, Albert may change his mind in just one minute, and if he does so before Bridget fires her gun, Bridget certainly cannot claim that shooting Albert was punishment (nor could Albert be executed later). On the other hand, if Bridget shoots him before he changes his mind, she can rightly claim, “Look, it was by your voluntary act that I am in this position. Sure, you may change your mind, but I cannot count on that. You culpably intend to harm me, and in so doing, you forfeit your right against my stopping you unless and until you abandon your intention. I am permitted to take you at your word regarding what you intend to do.” That is, the risk of error should properly be borne by the CA because in instances of prediction, there is always a risk of error. Between a CA and an innocent victim, it is fair to place the risk of error on the CA who culpably created the victim’s dilemma.³⁸

³⁸ Other theorists have used self-defense as a way of justifying punishment for the purpose of deterrence. See Daniel M. Farrell, *The Justification of General Deterrence*, 94 PHIL. REV. 367 (1985). Our view differs from Farrell’s in some significant respects. Farrell’s justification for self-defense, and therefore his justification for deterrence, requires that it be “inevitable that someone be harmed” for the justification to apply. *Id.* at 373. We disagree with this requirement. See Ferzan, *supra* note 28. Moreover, our view that a CA renders himself liable to PRLs that are designed specifically to stop him from one particular offense is more limited than Farrell’s use of self-defense as a basis for general deterrence. Whether our view can be extended in the same way is more than we can explore here.

IV. MOPPING UP: ANTICIPATED CULPABLE AGGRESSORS, ANTICIPATED INNOCENT AGGRESSORS, AND INNOCENT AGGRESSORS

A. *Anticipated Culpable Aggressors*

There remain some RBDs who do not fit the model of the CA. The CA consciously intends to commit an act in a range of future circumstances at least some of which would render the act culpable. But what of those who do not consciously intend such an act but who are nonetheless RBDs? In our book, we called such persons anticipated culpable aggressors (ACAs). For example, an ACA may be disposed to form an intention to commit a culpable act under certain conditions, conditions that may in fact obtain in the future. That disposition may take the form of a standing intention—"If I ever catch my wife with another man, I'll kill them both"—in which case it is easy enough to regard such an ACA as really a CA. On the other hand, the disposition may be just that—a disposition that the ACA has never consciously held as a standing intention. The ACA may have a violent, hair-trigger temper, such that we can predict culpable acts of violence in various possible circumstances. Or the ACA may be a pedophile who has no current intention to assault a minor, but who is quite likely to form such an intention.

We see no way to justify imposing PRLs on this latter type of ACA. We shall leave open and unexamined the possibility that society might be *excused* for imposing a PRL on such a person. Presumably, if PRLs may permissibly be imposed on RBDs who are not also CAs, the RBDs must be compensated to an extent necessary to make them indifferent to having the PRL imposed.

B. *Anticipated Innocent Aggressors*

Now, consider the case of a RBD who is an AIA (Anticipated Innocent Aggressor). The clearest case is that of the schizophrenic who dislikes taking his medication, where failure to do so will cause him to become nonresponsible and dangerous. If he omits to take his medicine while he is a responsible actor, he has lit a metaphorical fuse, and he may be punished for the risks to others that he has consciously disregarded. The more difficult question is whether the state may forcibly require, as a PRL, an AIA to, for example, take his medication. When the AIA becomes nonresponsible, we may preventively detain him under civil commitment laws. However, so long as he is voluntarily taking his medication, the AIA is acting responsibly and thus has done nothing dangerous or culpable. We see no way of imposing PRLs on AIAs while they are still taking their medication, and thus, no way for us to force them, while they are responsible, to take that medication—other than by the threat of criminal punishment if they omit to do so.

C. Innocent Aggressors

We turn finally to so-called innocent aggressors (IAs). In our book, we argued that defensive force against IAs might be personally justified or excusable (by the one threatened by the IAs), but that from a societal standpoint, the interests of IAs—unlike the interests of CAs—should not be subordinated to those of their intended victims.³⁹

IAs will fall into three categories: the legally insane, the young, and the mistaken. The insane and the young are not RBDs, and they can justifiably be restrained through civil commitment (for the insane) and through parental control (for the young). Those who are mistaken will, in most cases, when apprised of their mistake, cease to be dangerous. If, however, someone holds a mistaken belief that, if true, would justify violence, and that person cannot be dissuaded from that belief, then such an incorrigible mistake should arguably be regarded as rendering the person a nonresponsible agent. And as a nonresponsible agent, he should be subject to civil commitment for as long as he holds the mistaken view that renders him dangerous. Dangerousness is an independently necessary condition for civil commitment, of course. And in a liberal democracy, the holding of heterodox political views cannot in itself be regarded as sufficient to render someone dangerous. Rather, to lock someone up, there should have to be a showing that the person's beliefs are (very?) likely to directly lead to violence or other serious harms. As mentioned at the outset, dangerousness presents its own puzzles, and we will not resolve those here.

V. CODA: TECHNOLOGY AND PRLS

We have argued that RBDs like Max Cady and Frankie can justifiably be subjected to PRLs because they are CAs. Indeed, if proportionality is not required in responding to CAs, they may be liable to having severe PRLs imposed.

On the other hand, ACAs who have no standing culpable intention are not CAs and may not be liable to the range of PRLs to which CAs are liable. If we can be excused for imposing PRLs on them, it can only be under conditions in which they are fully compensated for the restrictions.

Technology may make imposing PRLs easily compensable in the case of ACAs and more benign than is morally required in the case of CAs. Monitoring devices can now be minimally intrusive but at the same time provide a reasonable level of protection from all RBDs, other than the undeterrables such as potential suicide bombers. Technology cannot solve moral dilemmas, but it can sometimes minimize their occurrences.

³⁹ See ALEXANDER & FERZAN, *supra* note 8, at 112–13.

